

Editor's note: 91 I.D. 115; Overruled to the extent inconsistent with Utah Chapter of the Sierra Club, 121 IBLA 1, 98 I.D. 267 (Oct. 4, 1991)

SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 86-43

Decided November 30, 1987

Appeal from a decision of the Bureau of Land Management District Manager, Cedar City, Utah, approving issuance of a permit to drill an oil and gas well. U-31225.

Dismissed as moot in part, affirmed in part.

1. Administrative Procedure: Administrative Review
-- Appeals: Generally -- Oil and Gas Leases:
Drilling -- Rules of Practice: Appeals: Effect of

Pursuant to 43 CFR 3165.4 (1986), decisions of BLM officials implementing the onshore oil and gas operating regulations at 43 CFR Subpart 3160 are an exception to the general rule set forth at 43 CFR 4.21(a) and are not automatically stayed pending appeal. Once an appeal to the Board has been filed, requests for suspension are properly filed with the Board of Land Appeals.

APPEARANCES: William J. Lockhart, Esq., Salt Lake City, Utah, for Southern Utah Wilderness Alliance; Robert G. Pruitt III, Esq., Salt Lake City, Utah, for Tenneco Oil Company, intervenor; David K. Grayson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Southern Utah Wilderness Alliance has appealed from a September 13, 1985, decision of the Cedar City, Utah, District Manager, Bureau of Land Management (BLM), approving Tenneco Oil Company's application for permit to drill (APD) the Little Valley No. 2-18 well within Federal oil and gas lease U-31225, in sec. 18, T. 37 S., R. 2 E., Salt Lake Meridian, Garfield County, Utah.

The September 13, 1985, decision granted permission to Tenneco to drill the Little Valley No. 2-18 well approximately 500 feet inside the boundaries

of the Mud Springs Canyon wilderness study area (WSA). 1/ The decision explained:

The Tenneco Lease covers lands both in and outside of the WSA. BLM investigated the alternative of locating the drill site outside the WSA, with slant drilling to the targeted optimum geologic location for oil and gas recovery and the use of conventional drilling to a less [desirable] geologic location.

BLM based its authority to allow drilling within the WSA on a provision in the BLM July 12, 1983, Revised Interim Management Policy, which it quoted:

Valid existing rights for mineral leases issued on or before October 21, 1976, are dependent upon the specific terms and conditions of each lease, including any stipulations attached to the lease. Activities for the use and development of such leases must satisfy the nonimpairment criteria [for wilderness study areas] unless this would unreasonably interfere with rights of the lessee as set forth in the mineral lease. When it is determined that the rights conveyed can be exercised only through activities that will permanently impair wilderness suitability, the activities will be regulated to prevent unnecessary or undue degradation. Nevertheless, even if such activities impair the area's wilderness suitability, they will be allowed to proceed.

See 48 FR 31855 (July 12, 1983).

From its review of the terms of Tenneco's lease, BLM found: "Tenneco's lease was issued in 1975 and thus is a pre-FLPMA lease [2/] A review of the lease terms indicates that Tenneco has been granted the exclusive right to remove the oil and gas within the lease boundary subject to standard stipulations" (BLM Decision Record at 2).

In concluding that the right to drill within the WSA should be granted, BLM set forth its analysis:

1/ Sec. 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(a) (1982), directs the Secretary of the Interior to review those roadless areas of the public lands in excess of 5,000 acres identified as having characteristics for suitability for preservation as wilderness. Pending a final determination on suitability, such WSA's are to be managed so as not to "impair" the suitability of the area for preservation as wilderness, subject to the continuation of mineral leasing in the manner and degree it was being conducted at the time of enactment and subject to valid existing rights. FLPMA, §§ 603(c), 701(h), 43 U.S.C. §§ 1782(c), 1701 note (1982). Further, the Secretary is directed to take "any action necessary to prevent unnecessary or undue degradation of the lands and their resources." 43 U.S.C. § 1782(c) (1982).

2/ Lease U-31225 was issued to Tenneco's predecessor in interest on Oct. 1, 1975.

The proposed activities of developing a producing oil well with a permanent access road, powerlines and oil pipeline would not satisfy the wilderness nonimpairment criteria * * *.

On the other hand, requiring Tenneco to drill outside the WSA would unreasonably interfere with the rights as set forth in the mineral lease. Further, requiring Tenneco to slant drill to the optimum recovery point would be an unreasonable interference with the rights granted them in the lease, due to increased costs and difficult geologic conditions encountered in drilling in this formation. The use of conventional drilling techniques at the alternate site outside of the WSA could mean the loss of a substantial portion of the oil resource contained within Tenneco's leasehold. It appears that the rights conveyed in the oil and gas lease can only be fully exercised through activities that will permanently impair the wilderness suitability on affected areas.

The WSA contains 38,085 acres. About 2 acres (or less than .01 percent of the WSA) would be disturbed by the Tenneco proposal.

BLM Decision Record at 2.

The decision granting the APD was accompanied by a final environmental assessment (EA), which set forth the mitigating measures to be followed by Tenneco when drilling within the WSA to avoid unnecessary environmental damage.

The decision approving the APD stated that "[t]his decision shall not become effective until the 27th of September [1985]," and explained the reason for the delay: "The purpose of the 15 days is to allow interested parties sufficient time to prepare a response, legal or otherwise, to the proposed decision prior to on ground implementation" (BLM Decision Record at 1).

On September 25, 1985, appellant filed a notice of appeal from the decision granting the APD with the Cedar City BLM District Office. At that time, appellant learned that drilling had been authorized to commence two days later. Thus, appellant also transmitted a telegram to the Cedar City, District Manager on September 25, 1985. The telegram requested a stay of the drilling, stating:

Petitioners specifically request that filing of this appeal suspend any action under the APD, as required by 43 CFR [4.21(a)]. If the right to appeal and suspension of action are denied, petitioners request their notice of appeal be treated as a protest, and that the director grant stay of action on the ground pending decision on the issues protested. Because of the imminent action, petitioners request immediate response. Under 5 U.S. Code 555(e) petitioners request statement of the facts and reasons justifying any denial of these requests.

The next day the District Manager informed appellant in a telephone conversation that no stay would be granted. Appellant indicates in its Further Statement of Reasons filed January 27, 1986, that work subsequently commenced on the Tenneco well on September 27, 1985, and continued through completion of drilling, resulting in a dry hole.

Apparently recognizing that the appeal is now moot with respect to the propriety of approving the APD within the boundary of the WSA, appellant maintains that the present appeal can be reduced to two "carefully limited procedural issues." 3/ These issues as stated by appellant are:

(1) Whether the BLM District Director can lawfully disregard an explicit request for a statement of facts and reasons explaining the basis for his refusal to institute a mandatory or discretionary stay of the action in dispute.

(2) Whether, on the basis of the existing record, the District Director properly refused (a) to give effect to the stay of action provided by 43 CFR section 4.21, or (b) to grant a stay to avert damage to wilderness values within a designated wilderness study area.

(Appellant's Statement of Reasons at 1). Appellant argues that it is entitled to an explanation for the refusal to grant a stay as a fundamental principle of administrative law. Further, appellant contends a careful reading of the regulation at 43 CFR 3165.4 (1986) 4/ does not support the abrogation of the automatic stay provision of 43 CFR 4.21(a) with respect to a decision to approve an APD. Noting the proviso at 43 CFR 3165.4 (1986) that "an appeal shall not result in a suspension of the requirement for compliance with the order or decision from which the appeal is taken," appellant argues approval of an APD is not a decision requiring compliance. Appellant urges the Board to overrule its decisions in Utah Wilderness Association, 91 IBLA 124, 127 n.4 (1986), and Animal Protection Institute of America, 79 IBLA 94, 102 n.3 (1984), to the extent they hold to the contrary. Appellant further contends the regulations at 43 CFR Subpart 3165 relate to relief from operating or producing requirements of lease and are not applicable to decisions approving APD's. Finally, appellant contends there is no indication in the record that a stay would be detrimental to the interest of the lessor.

3/ We note that from the time appellant filed its "Further Statement of Reasons" with the Board on Jan. 27, 1986, it has continued to maintain that appellate review should be restricted to the consideration of the issues raised by the failure to grant a stay of the authority to drill. See Appellant's Reply filed Apr. 15, 1986. Appellant has not pursued any allegations that the APD was improperly granted within a WSA.

4/ Subsequent to the events which form the basis for this appeal, the regulations governing appeals from orders or decisions under the operating regulations were revised. See 43 CFR 3165.3 and 3165.4, 52

FR 5394-5395 (Feb. 20, 1987).

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Tenneco, holder of the APD approved by BLM was allowed to intervene in this proceeding by order of the Board. Tenneco contends the automatic stay of decisions pending appeal under 43 CFR 4.21(a), which is the general rule, does not apply where it is specifically provided by regulation that decisions are not stayed by the filing of an appeal. Tenneco argues that the regulation at 43 CFR 3165.4 (1986) specifically provides that decisions regarding onshore oil and gas operations under the regulations at 43 CFR Part 3160 are not stayed by the filing of an appeal.

Counsel for BLM has appeared and also asserts that the regulation at 43 CFR 3165.4 (1986) provides an exception to the automatic-stay provision of 43 CFR 4.21(a). Further, BLM contends that requests for stay of a decision under appeal pursuant to 43 CFR 3165.4 (1986) are properly filed with the Board and not with BLM.

It appears from the record that, subsequent to the filing of this appeal, the well within the WSA was drilled resulting in a dry hole. Thus, we must conclude that with respect to the issue of the propriety of approval of the APD within the WSA, the appeal is properly dismissed as moot. However, the procedural issues of the effect of filing the notice of appeal and the inaction of BLM in response to appellant's stay request are recurring issues which are likely to arise again whenever an appeal is filed from approval of an APD. To dismiss the appeal as to these issues would tend to preclude this course of action from ever being reviewed by the Board on appeal and hence we will not dismiss the appeal as moot in this respect.

According to appellant, despite numerous requests on its part, the District Manager failed to provide any explanation as to why a stay in the drilling had not been granted. It also claims that it "further sought informal advice from the office of the BLM [Utah] State Director as to the grounds for denial of either form of stay of action. The only explanation offered was a cryptic suggestion by the associate state director * * * to 'try 43 CFR section 3165.4.'"

[1] Resolution of the issues raised by appellant requires an analysis of the effect of filing an appeal from a BLM decision approving an APD. An APD is granted or rejected by BLM pursuant to the regulations found in 43 CFR 3162.3-1, titled "Drilling Applications and Plans." The regulation at 43 CFR 3162.3-1 is found within 43 CFR Part 3160, which governs "operations associated with the exploration, development and production of oil and gas deposits from onshore leases issued or approved by the United States * * *." 43 CFR 3160.0-1. At the time the present appeal arose, appeals were governed by the regulation at 43 CFR 3165.4 (1986) which provided in pertinent part:

Instructions, orders or decisions issued under the regulations in this part [Part 3160] may be appealed in accordance with the provisions of Part 4 of this title if Federal lands are involved * * *. An appeal shall not result in a suspension of the requirement for compliance with the order or decision from which the appeal is taken unless the official to whom the appeal is made determines that suspension of the requirements of the

order or decision will not be detrimental to the interests of the lessor or upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage.

Thus, contrary to appellant's contention, the rules regarding the effect of decisions pending appeal set forth at 43 CFR 3165.4 (1986) applied to all appeals of decisions regarding onshore oil and gas operations issued pursuant to the regulations at 43 CFR Subpart 3160. Accordingly, both the Board and the courts have recognized that appeals from decisions approving an APD are governed by the rule at 43 CFR 3165.4 (1986) which provides an exception to the automatic stay pending appeal which otherwise applies under the provisions of 43 CFR 4.21(a). Park County (Wyoming) Resource Council v. Bureau of Land Management, 638 F. Supp. 842, 845 (D. Wyo. 1986); Utah Wilderness Association, supra; Animal Protection Institute of America, supra; see also, Mark S. Altman, 93 IBLA 265 (1986). We find that appellant's attempt to distinguish approval of APD's from other decisions under Subpart 3160 on the grounds APD's are mere authorizations rather than a decision requiring compliance is not sustainable on the basis of the broad language in the regulation. 5/

With respect to appellant's request for a statement of grounds by BLM for not staying the APD pending appeal, the issue is more properly characterized as one of jurisdiction to enter a stay. While a decision in response to the stay request giving reasons is something to which we find appellant is entitled, the question raised is where such a request is properly made.

The relevant regulation states that a decision issued under the operating regulations at 43 CFR Subpart 3160 shall not be suspended "unless the official to whom the appeal is made determines that suspension of the * * * decision will not be detrimental to the interests of the lessor * * *." 43 CFR 3165.4. Contrary to the assumptions made by appellant, the language "the official to whom the appeal is made" refers to the Board of Land Appeals, not to the official making the original decision under 43 CFR Part 3160.

5/ We note that the recently revised regulations provide for an intermediate appeal to the State Director with further right of appeal to the Board. 43 CFR 3165.3, 52 FR 5394-5395 (Feb. 20, 1987). With respect to the effect of appeals to the Board on the implementation of the decision below, the new regulation provides that:

"[A]n appeal shall not result in a suspension of the requirement for compliance with the order or decision from which the appeal is taken unless the Interior Board of Land Appeals determines that suspension of the requirements of the order or decision will not be detrimental to the interests of the lessor or upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage."

43 CFR 3165.4(c), 52 FR at 5395. Thus, the broad reference to all appeals of decisions regarding oil and gas operations pursuant to the regulations at 43 CFR Part 3160, which was contained in 43 CFR 3165.4 (1986), has been omitted. We find it inappropriate in the context of this case to consider whether this change would mandate a different result on the question of the stay of a decision approving an APD under the new regulations.

Part of the confusion in this regard stems from the general language used in 43 CFR 3165.4. However, a close reading of the language of the regulation demonstrates that such requests must be made to the Board.

A review of prior versions of the regulation supports our conclusion. Before August 12, 1983, the regulations governing lease operations presently found in 43 CFR Part 3160 were administered by the Minerals Management Service (MMS), and were found at 30 CFR Part 221. See 48 FR 36582 (Aug. 12, 1983). The regulation at 30 CFR 221.66 (1982), the predecessor of 43 CFR 3165.4, provided that a decision issued under 30 CFR Part 221 was not to be "suspended by reason of an appeal having been taken unless such suspension is authorized in writing by the Director [MMS] or the Board of Land Appeals (depending upon the official before whom the appeal is pending) * * *." At the time the regulations provided for an initial appeal to the Director, MMS, and a subsequent appeal to the Board from the Director's decision. See 30 CFR Part 290 (1982).

Shortly before lease operation oversight responsibilities were transferred to BLM, the language regarding suspension or stay of decisions pending appeal was changed to its present form. 30 CFR 221.73, 47 FR 47772 (Oct. 27, 1982). There was no indication of any intent to alter the authority reposed in the Board to approve a stay where a decision has been appealed to the Board.

Accordingly, appellant sought a stay of the decision in the wrong forum. The stay request should have been filed with the Board of Land Appeals. Presumably this was the message BLM was trying to communicate when it referred appellant to the provisions of 43 CFR 3165.4. Hence, BLM cannot be faulted for failing to approve or reject the stay request.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed as moot in part and the decision of BLM is affirmed in part.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

R. W. Mullen
Administrative Judge